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IN THE

Supreme Court of the United States.

October Term, 1929.

ARTHUR E. COLGATE, Administrator of the Estate of Clinton G. Colgate, Deceased, *Petitioner*,
v.
THE UNITED STATES.

No. 74.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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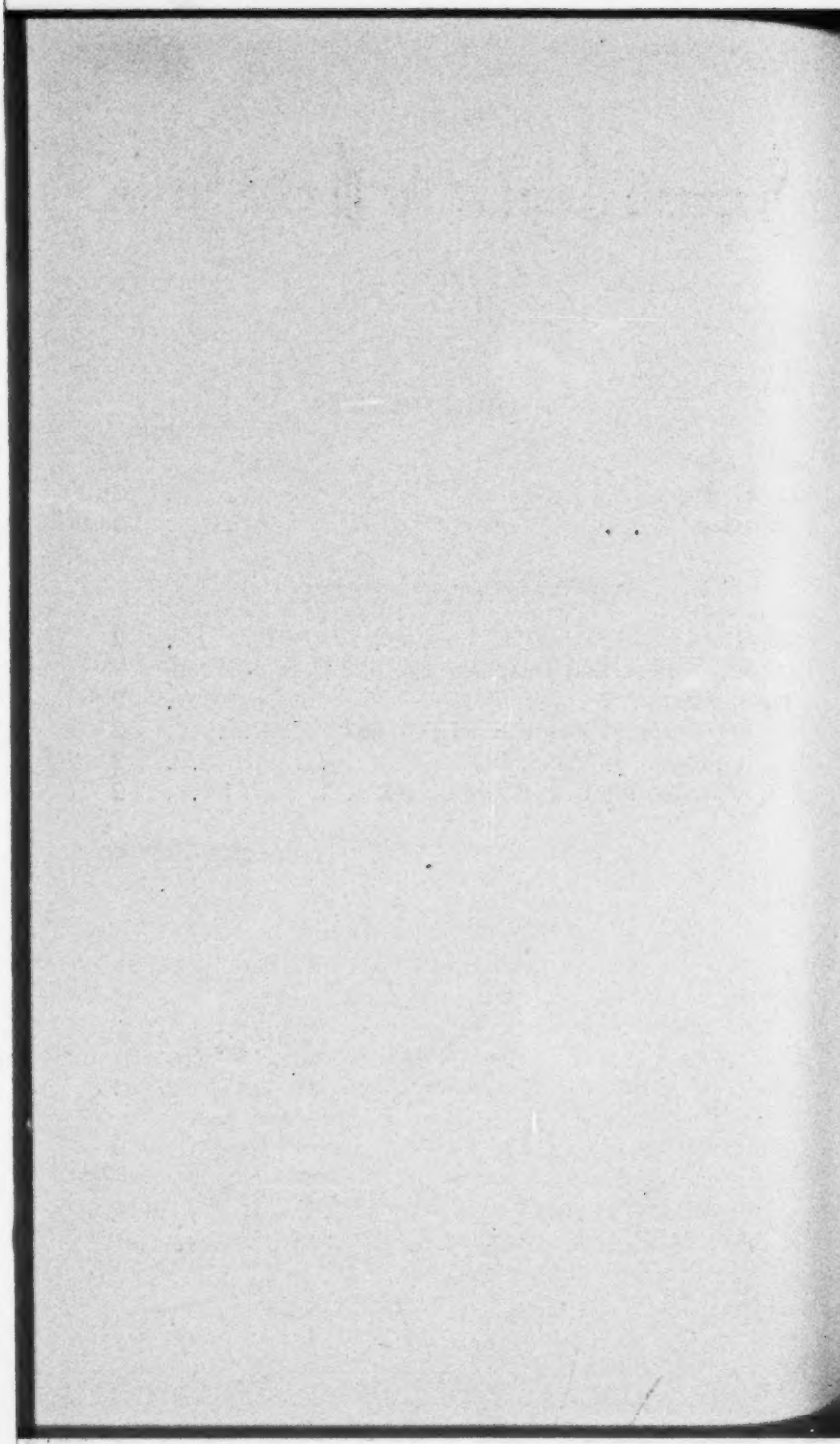

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The brief for the United States throws into strong relief the extent to which the decision of the Court of Claims contradicts the two important principles of *stare decisis* and *res judicata*.

1. *Stare Decisis.*

The many suits brought by Colgate against powerful and important infringers are enumerated in our brief in support of this petition, pp. 3, 4. Every one of them was decided in favor of Colgate after earnest contestation of the validity of the patent. No appeals were taken and the decrees were submitted to by these powerful infringers.

The proposition that decrees repeatedly sustaining the validity of a patent and holding the infringers liable in damages can thereafter be assailed without bringing anything forward to discredit them beyond objections already considered and overruled by the court which rendered the decision is, to say the least, startling. It would not be permitted in private infringement litigation over a patent. Why should a different rule apply when the United States is the infringer?

2. *Res Judicata.*

The two cases of *United States* v. *American Bell Telephone Company*, 128 U. S. 315, 159 U. S. 548, 555, cited in the brief for the United States, p. 15, place the right of the United States to maintain a bill in equity to repeal a patent for an invention on the same ground as the right to maintain such a suit to repeal a land patent. No distinction is taken between the two. When the United States came into court as a litigant it set up this identical letter of January, 1851, withdrawing the application for patent as a ground for asking the Circuit Court to repeal the patent. Two opinions were delivered in that case, one denying the motion for a preliminary injunction, the other dismissing the bill on its merits on demurrer, *United States* v. *Colgate*, 21 Fed. 318, 32 Fed. 624. Judge Wallace, in the latter of these two opinions, while not specifically mentioning this letter of withdrawal had it before him and necessarily held it insufficient to warrant a finding that the patent had been improperly issued.

A decree or judgment in a suit to which the United States is a party is conclusive in future litigation between the same parties. It was so held where the prior judgment was *in favor* of the United States, *Hubbell* v. *United States*, 171 U. S. 203, 207, 208. It was equally applied to a case where the prior judgment had been *against* the United States, *United States* v. *Moser*, 266 U. S. 236, 241, 242. It must necessarily apply in this case where the Government sets up and has so far succeeded in maintaining a defense many years ago discredited and overruled by the very court in which the Government itself sought relief. This decree was found to be so incapable of being successfully assailed that the highest law officers of the Government abandoned and dismissed their appeal in this court, *United States* v. *Colgate*, 127 U. S. 792. The decree thereby became forever binding and conclusive on the United States in all cases thereafter arising affecting the validity of this patent.

CONCLUSION.

In addition to being a case where there are conflicting de-

cisions in different courts on the validity of the same patent, the present case is one in which the court below "has so far departed from the accepted and usual course of judicial proceedings" "as to call for an exercise of this court's power of supervision" (Rule 38, Par. 5 (b)).

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